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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 GERALDINE BURKE,

11 Plaintiff,

12 v.

13 PROFESSIONAL
14 TRANSPORTATION, INC.,

15 Defendant.

CASE NO. C18-0081JLR

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
AN EXTENSION OF TIME TO
RESPOND

16 **I. INTRODUCTION**

17 Before the court are: (1) Plaintiff Geraldine Burke's motion for partial summary
18 judgment (MPSJ (Dkt. # 20)); and (2) Defendant Professional Transportation, Inc.'s
19 ("PTI") motion for an extension of time to respond to Ms. Burke's motion (MET (Dkt.
20 # 23)). The court has reviewed the motions, the parties' submissions filed in support of
21 and in opposition to both motions, the relevant portions of the record, and the applicable
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1 law. Being fully advised,¹ the court GRANTS in part and DENIES in part Ms. Burke's
2 motion for partial summary judgment, and DENIES PTI's motion for an extension of
3 time to respond.

4 II. BACKGROUND

5 PTI hired Ms. Burke in October 2012, as an over-the-road shuttle driver. (Burke
6 Decl. (Dkt # 21) ¶ 2.) In that role, Ms. Burke transported railroad crews between work
7 sites. (*Id.*) PTI instructed Ms. Burke on when and where to pick up the crews and where
8 to bring the crews. (*Id.*) Ms. Burke was required to wait for her next assignment in the
9 PTI facility. (*Id.*)

10 Ms. Burke did not supervise any subordinate PTI employees. (*Id.* ¶ 3.) She was
11 not in charge of any PTI subdivision. (*Id.*) Ms. Burke's position did not require any
12 specialized instruction or education. (*Id.*) In her position, Ms. Burke provided services
13 to PTI's customers, but she did not contribute to PTI's day-to-day business. (*Id.*)

14 On December 12, 2017, Ms. Burke filed a complaint against PTI in King County
15 Superior Court for the State of Washington. (*See* Compl. (Dkt. # 1-1); *see also* NOR
16 (Dkt. # 1) at 1.) Among other claims, Ms. Burke alleges that PTI failed to pay her for all
17 of the hours that she worked and failed to pay her at an overtime rate for at least some of
18 her overtime hours. (*See* Compl. ¶¶ 3.1-3.5.) On January 18, 2018, PTI removed Ms.
19 Burke's complaint to federal court on the basis of both diversity of citizenship and federal

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21 ¹ Neither party has requested oral argument on either motion. (*See* MPSJ at 1; MET at 1;
22 PTI Resp. (Dkt. # 24) at 1; Burke Resp. (Dkt. # 29) at 1.) The court does not consider oral
argument to be necessary for its disposition of these motions. *See* Local Rules W.D. Wash. LCR
7(b)(4).

1 question jurisdiction. (NOR at 2-6 (citing 28 U.S.C. §§ 1331, 1332(c)(1)).) On April 9,
2 2018, the court issued a scheduling order setting the trial to commence on June 24, 2019,
3 the discovery cutoff on February 25, 2019, and the dispositive motions deadline on
4 March 26, 2019. (*See* Sched. Order (Dkt. # 15) at 1.)

5 On March 22, 2018, PTI served Ms. Burke with a set of written discovery
6 requests, including interrogatories and requests for the production of documents.
7 (Maslowski Decl. (Dkt. # 25) ¶ 4.) Ms. Burke timely responded on April 22, 2018. (*See*
8 *id.* ¶¶ 5, 8, Ex. A (attaching Ms. Burke's responses to PTI's written discovery requests).)
9 Although PTI complains about the adequacy of Ms. Burke's responses (*see id.* ¶¶ 9-10;
10 *see also* MET ¶ 4), PTI has not brought a motion to compel additional responses (*see*
11 *generally* Dkt.). Since responding to Ms. Burke's written discovery requests on May 11,
12 2018, PTI has been "evaluating next steps in the discovery process for this matter."
13 (Maslowski Decl. ¶ 6.) Despite this months-long evaluation, PTI has not issued any
14 additional written discovery requests, noted Ms. Burke's deposition, or conducted any
15 further discovery since it issued its original written discovery requests to Ms. Burke. (*See*
16 2d Montine Decl. (Dkt. # 27) ¶ 2 ("Since Ms. Burke responded to PTI's first set of
17 discovery requests, PTI has not followed up on those requests or propounded additional
18 discovery requests."))

19 On September 13, 2018, nearly five months after serving PTI with her discovery
20 responses, Ms. Burke filed a motion for partial summary judgment. (*See* MPSJ.) In her
21 motion, Ms. Burke asks the court to rule on summary judgment that (1) she worked at
22 least some overtime hours while at PTI (*id.* at 3-4); (2) the exception for overtime pay

1 under Washington law for truck and bus drivers who are subject to the “Federal Motor
2 Carrier Safety Act (FMCSA)” does not apply to Ms. Burke’s claim (*id.* at 4-5); (3) other
3 overtime pay exemptions for executive, administrative, and professional employees also
4 do not apply (*id.* at 6); (4) she is entitled to overtime pay of at least one and one-half
5 times her regular hourly rate for any hours that she worked over 40 hours in a given week
6 (*id.* at 4); and (5) PTI is liable to Ms. Burke for any overtime that she worked but for
7 which she was not properly paid (*id.* at 5-6). Ms. Burke does not seek partial summary
8 judgment on the exact number of hours she worked overtime while employed at PTI, the
9 number of such hours for which PTI allegedly did not pay her, or the amount of
10 corresponding lost wages to which she is allegedly entitled. (*See id.* at 1 (“The [c]ourt
11 should allow [Ms.] Burke to provide evidence of the amount of unpaid overtime hours
12 and corresponding lost wages at a later hearing or at trial.”); *id.* at 6 (“[Ms.] Burke will
13 submit, at a later date, evidence of the amount of overtime PTI failed to pay her.”).)

14 On October 1, 2018, the same day that its response to Ms. Burke’s motion for
15 partial summary judgment was due, PTI filed a motion for an extension of time to
16 respond to Ms. Burke’s motion. (*See* MET.) In its motion, PTI asks the court for an
17 additional 45 days to respond to Ms. Burke’s motion for partial summary judgment. (*Id.*
18 at 1.) On October 1, 2018, PTI also filed a response to Ms. Burke’s partial summary
19 judgment motion seeking relief under Federal Rule of Civil Procedure 56(d). (*See*
20 *generally* PTI Resp.) Specifically, because discovery does not close until February 25,
21 2019 (*see* Sched. Order at 1), PTI asks the court to defer ruling on Ms. Burke’s motion
22 for partial summary judgment until such time as PTI completes its discovery (*see* PTI

1 Resp. at 1-2). PTI's response to Ms. Burke's motion is based entirely on Rule 56(d); PTI
2 did not provide a substantive response to Ms. Burke's motion. (*See generally id.*)

3 The court now considers Ms. Burke's motion for partial summary judgment and
4 PTI's motion for an extension of time to respond.

5 III. ANALYSIS

6 A. PTI's Motion for Additional Time and Rule 56(d) Response

7 Before addressing Ms. Burke's motion for partial summary judgment, the court
8 must address PTI's motion for an extension of time to respond to Ms. Burke's motion and
9 PTI's request for Rule 56(d) relief seeking additional time to conduct discovery.² (*See*
10 *MET*; *PTI Resp.*) Federal Rule of Civil Procedure 56(d) "provides a device for litigants
11 to avoid summary judgment when they have not had sufficient time to develop
12 affirmative evidence." *Atigeo LLC v. Offshore Ltd. D*, No. C13-1694JLR, 2014 WL
13 1494062, at *3 (W.D. Wash. Apr. 16, 2014) (quoting *United States v. Kitsap Physicians*
14 *Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002)). Rule 56(d) states that "[i]f a nonmovant
15 shows by affidavit or declaration that, for specified reasons, it cannot present facts
16 essential to justify its opposition," the court may defer considering the motion, deny the
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18 ² PTI's Federal Rule of Civil Procedure 6(b) motion for additional time and its request
19 for Rule 56(d) relief in its response to Ms. Burke's motion are based on the same facts and
20 arguments. (*Compare MET*, with *PTI Resp.*; *see also MET* at 1 n.1 (Contemporaneous with this
21 Motion, [PTI] is also filing its Rule 56(d) Response to [Ms. Burke's] Summary Judgment
22 Motion. "[PTI] files this Motion for Enlargement for alternative relief from its Rule 56(d)
Response.") Rule 6(b) requires PTI to demonstrate "good cause" to extend the time for PTI to
respond to Ms. Burke's motion. *See Fed. R. Civ. P. 6(b)(1)(A)*. The court sees no reason to
examine PTI's Rule 6(b) motion and Rule 56(d) response separately, and therefore, considers
these filing together. In this instance, the court's conclusion is the same when applying either
Rule 56(d) or Rule 6(b) to the facts at hand.

1 motion, allow time to obtain affidavits or declarations to take discovery, or “issue any
2 other appropriate order.” Fed. R. Civ. P. 56(d). However, “[t]he district court does not
3 abuse its discretion by denying further discovery if the movant has failed diligently to
4 pursue discovery in the past.” *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995)
5 (quoting *Cal. Union Ins. Co. v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir.
6 1990)); *see also Landmark Dev. Corp. v. Chambers Corp.*, 752 F.2d 369, 372 (9th Cir.
7 1985) (ruling that the district court did not abuse its discretion in denying a Rule 56(d)
8 motion for further discovery where the moving parties did not adequately explain their
9 failure to proceed with additional depositions promptly).

10 Rule 56(d) requires the nonmovant to make “(1) a timely application which (2)
11 specifically identifies (3) relevant information, (4) where there is some basis for believing
12 that the information sought actually exists.” *VISA Int’l Serv. Ass’n v. Bankcard Holders*
13 *of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).³ A Rule 56(d) affidavit or declaration must
14 identify “the specific facts that further discovery would reveal, and explain why those
15 facts would preclude summary judgment.” *Sec. & Exch. Comm’n v. Stein*, 906 F.3d 823,
16 833 (9th Cir. 2018) (quoting *Tatum v. City & Cty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir.
17 2006)). “The facts sought must be ‘essential’ to the party’s opposition to summary
18 judgment,” *id.* (quoting Fed. R. Civ. P. 56(d)), “and it must be ‘likely’ that those facts

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20 ³ On December 1, 2010, Federal Rule of Civil Procedure 56(f) was renumbered and is
21 now Federal Rule of Civil Procedure 56(d). The advisory committee’s notes to Rule 56
22 regarding the 2010 amendments state that “[s]ubdivision (d) carries forward without substantial
change the provisions of former subdivision (f).” Fed. R. Civ. P. 56 Advisory Committee’s
Notes. Thus, the cited authorities that refer to Rule 56(f) provide guidance on matters related to
the current Rule 56(d). *Id.*

1 will be discovered during further discovery,” *id.* (quoting *Margolis v. Ryan*, 140 F.3d
2 850, 854 (9th Cir. 1998)). The burden is on the party seeking to conduct further
3 discovery “to show what material facts would be discovered that would preclude
4 summary judgment.” *Klinge v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988); *see also*
5 *Conkle*, 73 F.3d at 914 (“The burden is on the party seeking to conduct additional
6 discovery to put forth sufficient facts to show that the evidence sought exists.”).

7 As discussed below, although PTI submits a lengthy declaration in support of its
8 Rule 56(d) request for additional time to conduct discovery, PTI fails to meet its burden
9 and the court denies its request for additional time to respond to Ms. Burke’s motion. In
10 her declaration, PTI’s counsel complains about the adequacy of Ms. Burke’s discovery
11 responses, declares PTI’s intention to take additional discovery, and generally describes
12 the areas of discovery PTI wishes to pursue and the information it hopes to elicit. (*See*
13 *generally* Maslowski Decl.) However, PTI never adequately connects the information it
14 seeks to the specific issues raised in Ms. Burke’s motion and never explains its delay in
15 seeking additional discovery. (*See generally id.*; *see also* PTI Resp.; MET.)

16 Accordingly, the court concludes that PTI fails to meet its burden justifying any delay in
17 the court’s ruling. *See* Fed. R. Civ. P. 56(d); *see also* Fed. R. Civ. P. 6(b).

18 First, PTI’s attorney attests that there are “several deficiencies in [Ms.] Burke’s
19 written responses, some specifically in regards to her claim for failure to pay overtime
20 premiums” (Maslowski Decl. ¶ 7.) Yet, PTI’s attorney never explains how these
21 “deficiencies” relate to the issues raised in Ms. Burke’s motion for partial summary
22 judgment. (*See generally id.*) For example, PTI’s attorney complains that Ms. Burke

1 “failed to properly identify individuals she believes has [sic] relevant information” and
2 that this information “is critical to testing [her] conclusion that PTI had notice of her
3 alleged compensation issues.”⁴ (*Id.* ¶ 9.) However, Ms. Burke has not sought partial
4 summary judgment on the issue of “notice,” and PTI never explains how evidence
5 concerning its “notice” of Ms. Burke’s claims would render inappropriate the court’s
6 entry of partial summary judgment on the issues Ms. Burke does raise. Indeed, PTI fails
7 to identify any “specific facts” it seeks to counter the narrow issues raised in Ms. Burke’s
8 motion. *See Stein*, 906 F.3d at 833; (*see generally* Maslowski Decl.). Without some
9 indication of the “specific facts” PTI seeks that are “essential” to its opposition, PTI’s
10 complaints about the adequacy of Ms. Burke’s discovery responses do not warrant a
11 delay in the court’s ruling. *See Stein*, 906 F.3d at 833. Further, PTI had almost five
12 months to file a motion to compel prior to Ms. Burke’s motion for partial summary
13 judgment but failed to do so. PTI’s lack of diligence in pursuing discovery is also
14 sufficient grounds to deny its Rule 56(d) request for an extension of time. *See Conkle*, 73
15 F.3d at 914.

16 Second, PTI’s attorney also states the PTI would like to depose Ms. Burke “to test
17 her conclusion” that she is not exempt from overtime pay requirements. (*Id.* ¶ 13; *see*
18 *also id.* ¶¶ 11-12 (indicating a desire to depose Ms. Burke to test the statements in her
19 declaration).) Again, PTI’s attorney fails to identify the “specific facts [s]he hopes to

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21 ⁴ PTI’s attorney also complains that Ms. Burke merely refers to her complaint when
22 asked to identify specific facts, witnesses, and documents that support her claims. (Maslowski
Decl. ¶ 10.)

1 discover” during Ms. Burke’s deposition that will raise an issue of material fact
2 concerning Ms. Burke’s non-exempt status. *See Cont’l Mar. of S.F., Inc. v. Pac. Coast*
3 *Metal Trades Dist. Council, Metal Trades Dep’t, AFL-CIO*, 817 F.2d 1391, 1395 (9th
4 Cir. 1987). At most, PTI’s attorney asserts that deposing Ms. Burke “could elicit facts
5 that could create an issue of material fact as to whether [Ms.] Burke was exempt”
6 (Maslowski Decl. ¶ 13 (italics added).) This type of “pure speculation” is insufficient to
7 support a Rule 56(d) request to defer the entry of summary judgment. *See State of Cal.,*
8 *on Behalf of Cal. Dep’t of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779-80
9 (9th Cir. 1998) (“Denial of a Rule 56(f) application is proper where it is clear that the
10 evidence sought . . . is the object of pure speculation.” (quoting *Terrell v. Brewer*, 935
11 F.2d 1015, 1018 (9th Cir.1991))).⁵

12 Finally, PTI asserts that it would like to depose Ms. Burke to test her conclusion
13 “that PTI refused to pay her” and to demonstrate that she “was, in fact, paid for all work
14 actually completed and compensable under the FLSA.” (Maslowski Decl. ¶¶ 15-16; *see*
15 *also id.* ¶ 17.) Yet, Ms. Burke’s motion does not raise this issue and, indeed, expressly
16 reserves “the amount of unpaid overtime hours and corresponding lost wages [for] a later
17 hearing or trial.” (MPSJ at 2; *see also id.* at 6 (“[Ms.] Burke will submit, at a later date,
18 evidence of the amount of overtime PTI failed to pay her.”).) Thus, these facts are not

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22 ⁵ *See supra* note 3.

1 material to Ms. Burke's present motion nor "essential" to PTI's opposition.⁶ *See Stein*,
2 906 F.3d at 833.

3 Moreover, as noted above, PTI's attorney attests that "PTI began evaluating next
4 steps in the discovery process" as early as May 2018. (Masklowski Decl. ¶ 6.) Yet, PTI
5 has not noted Ms. Burke's deposition nor conducted any further discovery since its initial
6 round of written requests to Ms. Burke. (2d Montine Decl. ¶ 2 ("Since Ms. Burke
7 responded to PTI's first set of discovery requests, PTI has not followed up on those
8 requests or propounded additional discovery requests.")) In addition, as stated, despite
9 complaining about the inadequacy of Ms. Burke's discovery responses, PTI has not filed
10 a motion to compel during the nearly five-month intervening period between PTI's
11 receipt of Ms. Burke's responses and the filing of Ms. Burke's motion. (*See generally*
12 Dkt.) PTI has not explained its delay in pursuing Ms. Burke's deposition and other
13 discovery. (*See generally* Maslowski Decl.) this failure provides sufficient grounds to
14 deny PTI's request for Rule 56(d) relief. *See Landmark Dev. Corp.*, 752 F.2d at 372.

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17 ⁶ PTI's attorney also attests that PTI needs to depose Ms. Burke to explore
18 "contradictions" between Ms. Burke's interrogatory response and the declaration of Peter
19 Montine, which Ms. Burke filed in support of her motion for partial summary judgment. (*See*
20 Maslowski Decl. ¶ 19; *see also* 1st Montine Decl. (Dkt. # 22).) The statements in the two
21 documents pertain to the number of overtime hours Ms. Burke worked while she was employed
22 at PTI. (*See id.*) The court is unconvinced that the two statements are contradictory.
Nevertheless, even if they are contradictory, the information is immaterial to the issues upon
which Ms. Burke asks the court rule on partial summary judgment. Although Ms. Burke asks the
court to rule that she worked at least some overtime hours while employed at PTI, she does not
ask the court to rule on a specific number of hours. (*See* MPSJ at 1-2.) The fact that Ms. Burke
worked at least some overtime at PTI does not appear to be in dispute because PTI paid Ms.
Burke for some overtime during her employment there. (*See* 1st Montine Decl. ¶ 2, Ex. 1
(attaching paystubs for Ms. Burke, some of which note "Overtime Pay").)

1 Based on the court's analysis of PTI's counsel's Rule 56(d) declaration, the court
2 concludes that PTI has not meet its burden of demonstrating that it is likely that
3 additional discovery will reveal material facts essential to its opposition to Ms. Burke's
4 motion for partial summary judgment. Accordingly, the court DENIES both PTI's
5 motion for an extension of time to respond and the Rule 56(d) relief requested in its
6 response to Ms. Burke's motion.⁷

7 **B. Ms. Burke's Motion for Partial Summary Judgment**

8 "A party may move for summary judgment, identifying each claim or defense—or
9 the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ.

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11 ⁷ PTI implies that even if the court denies PTI additional time to conduct discovery, or
12 even if additional discovery does not "disclose any other material facts," it continues to have the
13 right to file a substantive response to Ms. Burke's motion for partial summary judgment. (See
14 PTI Resp. at 2.) PTI asserts that courts "have held that a party 'may not attempt to meet a
summary judgment challenge head-on but fall back on [Rule 56(d)] if its first effort is
unsuccessful.'" (*Id.* (quoting *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1235 (10th Cir. 2007), and
citing *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 23 (1st Cir. 1999)).) Thus, PTI
states that it filed a Rule 56(d) response "instead of attempting to oppose summary judgment
without the proper discovery." (*Id.*)

15 Nothing in Rule 56 prohibits a party from seeking relief under Rule 56(d) while
16 simultaneously responding to a motion for summary judgment on substantive grounds. See Fed.
17 R. Civ. P. 56(d). Further, PTI misunderstands the out-of-circuit authority it cites. The cases PTI
18 relies upon prohibit a party from responding substantively to a motion for summary judgment
19 and then applying for Rule 56(d) relief after the court has granted summary judgment to the
20 party's opponent. See *Been*, 495 F.3d at 1235; see also *Rodriguez-Cuervos*, 181 F.3d at 22
21 (stating that the plaintiff filed his Rule 56(f) motion "[a]fter the district court's grant of summary
22 judgment"); see also *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006)
("A nonmoving party wishing to invoke the protections of Rule 56(f) must attempt to do so by
submitting an affidavit in direct response to a motion for summary judgment, not following the
district court's disposition of that motion."). The authorities PTI relies upon do not counsel
against filing a substantive response and a request for additional time under Rule 56(d)
simultaneously. Finally, there is nothing in either Rule 56 or the court's Local Rules that would
allow a party to file an untimely substantive response to a motion for summary judgment after
the court has denied the party's Rule 56(d) request for a continuance. See Fed. R. Civ. P. 56;
Local Rules W.D. Wash. LCR 7. By failing to file a timely substantive response to Ms. Burke's
motion, PTI has now lost the opportunity to do so.

1 P. 56(a). Summary judgment is proper where, viewing the evidence and inferences
2 therefrom in favor of the nonmoving party, “the movant shows that there is no genuine
3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
4 *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those
5 that may affect the outcome of the suit under governing law, and an issue of material fact
6 is genuine “if the evidence is such that a reasonable jury could return a verdict for the
7 nonmoving party.” *Anderson*, 477 U.S. at 248. The moving party bears the initial burden
8 of showing there is no genuine issue of material fact and that he or she is entitled to
9 prevail as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the
10 moving party meets his or her burden, the non-moving party “must make a showing
11 sufficient to establish a genuine dispute of material fact regarding the existence of the
12 essential elements of his case.” *Galen v. Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007).

13 Ms. Burke seeks summary judgment on the following issues: (1) she worked at
14 least some overtime hours while employed at PTI (MPSJ at 3-4); (2) the exception for
15 overtime pay under Washington law for truck and bus drivers who are subject to the
16 “Federal Motor Carrier Safety Act (FMCSA)” does not apply to her claims (*id.* at 4-5);
17 (3) other overtime pay exemptions for executive, administrative, and professional
18 employees do not apply to her claims (*id.* at 6); (4) she is entitled to overtime pay of at
19 least one and one-half times her regular hourly rate for any hours that she worked over 40
20 hours in a given week (*id.* at 4); and (5) PTI is liable to Ms. Burke for any overtime that

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1 he worked but for which PTI did not properly pay her (*id.* at 5-6).⁸ The court addresses
2 each issue in turn.

3 1. Overtime

4 Ms. Burke asks the court to rule that she worked at least some overtime hours
5 while employed at PTI. (*Id.* at 6; Burke Reply (Dkt. # 26) at 1.) In support of her
6 motion, she submits evidence, based on data PTI produced during discovery, that she
7 worked at least some overtime hours while PTI employed her. (*See* 1st Montine Decl. ¶
8 4, Ex. 3 (setting forth a chart detailing Ms. Burke's overtime hours based on data from an
9 11-page Excel spreadsheet produced by PTI during discovery, entitled "[PTI] Geradline
10 Burke . . . Trip List"); *see also id.* ¶ 3, Ex. 2 at 4 (attaching PTI's discovery response
11 referring Ms. Burke to "her pay and trip records (PTI000054-PTI000148)").) Although
12 PTI describes Ms. Burke's evidence as "unsupported and unfounded" (PTI Resp. at 3),
13 PTI does not explain why her analysis of PTI's data is flawed (*see generally id.*). As a
14 result, Ms. Burke's evidence is uncontested, and PTI has failed to show that there is a
15 "genuine dispute" as to this material fact. *See* Fed. R. Civ. P. 56(a). Accordingly, the
16 court "consider[s] the fact undisputed," *see* Fed. R. Civ. P. 56(e)(2), and grants this

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21 ⁸ (*See also* MPSJ at 2 ("The Court should hold that [Ms.] Burke was non-exempt and that
22 PTI was required to pay her at one and one-half time her regular rate for all overtime hours she
worked. The Court should further hold that PTI is liable for any overtime for which PTI did not
properly pay [Ms.] Burke."))

1 portion of Ms. Burke's motion for partial summary judgment, *see* Fed. R. Civ. P.
2 56(e)(3).⁹

3 2. Federal Motor Carrier Act Exemption

4 Washington law requires all employers to pay their employees overtime for hours
5 worked over 40 in a workweek. RCW 49.46.130(1). However, the statute provides for
6 certain exemptions including one for "[a]n individual employed as a truck or bus driver
7 who is subject to the provisions of the Federal Motor Carrier Act, 49 U.S.C. § 1301 *et*
8 *seq.*" *See* RCW 49.46.130(2)(f). The court construes such statutory exemptions
9 narrowly. *Stahl v. Delicor of Puget Sound, Inc.*, 64 P.3d 10, 12 (Wash. 2003). Further,
10 PTI bears the burden of proving the applicability of an exemption. *Fiore v. PPG Indus.,*
11 *Inc.*, 279 P.3d 972, 977-78 (Wash. Ct. App. 2012) ("An employer can assert that its
12 employee falls into one of these exemption categories and, therefore, is not entitled to
13 overtime wages; however, the employer bears the burden of proving the applicability of
14 such an exemption.") (citing *Drinkwitz v. Alliant Techsystems, Inc.*, 996 P.2d 582, 587
15 (Wash. 2000)).

16 Ms. Burke argues that one of PTI's responses to her discovery requests forecloses
17 PTI's reliance on the exemption found in RCW 49.46.130(2)(f). (MPSJ at 4 (citing 1st
18 Montine Decl. ¶ 3, Ex. 2).) In one of her interrogatories, Ms. Burke asks PTI to:

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21 ⁹ Ms. Burke does not ask the court to rule on the exact number of overtime hours that she
22 worked (*see* Burke Reply at 1 (stating that she asks the court "to make [the] straightforward legal
determination[] that she . . . worked overtime on at least one occasion")), and the court does not
do so.

1 Please describe your policies regarding compliance with the Federal Motor
2 Carrier Safety Act (FMCSA) and identify the person(s) responsible for
enforcing those policies.

3 (*Id.* at 5.) In response, PTI states, in part, that “at all times relevant to this case, PTI’s
4 Seattle fleet was not regulated by the FMSCA.” (*Id.*) Ms. Burke argues that PTI’s
5 response entitles her to summary judgment that the exemption found in RCW
6 49.46.130(2)(f) does not apply to her claims.

7 There is an anomaly in both Ms. Burke’s question and PTI’s response. The Act
8 referenced in RCW 49.46.130(2)(f) is the Federal Motor Carrier Act (“FMCA”) and not
9 the “Federal Motor Carrier Safety Act (FMCSA)” as Ms. Burke states in her
10 interrogatory question. *Compare* RCW 49.46.130(f)(2), *with* (1st Montine Decl. ¶ 3, Ex.
11 2 at 5.) The acronym that both Ms. Burke and PTI utilize stands for the Federal Motor
12 Carrier Safety Administration, which is the agency that enforces the FMCA. *See Overton*
13 *v. Uber Techs., Inc.*, No. 18-CV-02166-EMC, 2018 WL 3830096, at *4, *8 (N.D. Cal.
14 Aug. 8, 2018). Nevertheless, Ms. Burke’s motion was clear that she interpreted PTI’s
15 response as excluding the possibility that the exemption found in RCW 49.46.130(2)(f)
16 applied to her claims. (*See* MPSJ at 4-5.) PTI provides no evidence or argument in
17 opposition to that portion of Ms. Burke’s motion. (*See generally* Resp.) Indeed, PTI
18 never argues that the exemption in RCW 49.46.130(f)(2) does apply. (*See generally id.*)
19 Accordingly, the court grants this aspect of Ms. Burke’s motion and rules on summary
20 judgment that the exemption found in RCW 49.46.130(2)(f) is inapplicable to her claims.

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1 3. Other Exemptions

2 In addition to the exemption above, Ms. Burke's motion also addresses three of
3 the exemptions found in RCW 49.46.130(2)(a). (*See* MPSJ at 6.) RCW 49.46.130(2)(a)
4 provides that Washington's overtime statute "does not apply to . . . [a]ny person
5 exempted pursuant to RCW 49.46.010(3)." RCW 49.46.130(2)(a). Subsection (c) of this
6 provision of the Revised Code of Washington refers to "[a]ny individual employed in a
7 bona fide executive, administrative, or professional capacity" RCW
8 49.46.130(3)(c). Ms. Burke argues that these exemptions do not apply to her claim.
9 (MPSJ at 6.) Like the exemption in RCW 49.46.130(2)(f) discussed above, the court
10 narrowly construes these exemptions, *see Stahl*, 64 P.3d at 12, and PTI bears the burden
11 of establishing their applicability, *see Fiore*, 279 P.3d at 977-78.

12 *a. Executive Capacity*

13 The Washington Administrative Code defines an "individual employed in a bona
14 fide executive . . . capacity," in part, as any employee "[w]hose primary duty consists of
15 the management of the enterprise in which he is employed or of a customarily recognized
16 department or subdivision thereof; and . . . [w]ho customarily and regularly directs the
17 work of two or more other employees therein. WAC 296-128-510(1), (2). Ms. Burke
18 attests that she "was not in charge of any subdivision of PTI" and "did not have any
19 subordinates." (Burke Decl. ¶ 3.) PTI does not challenge or dispute this testimony or
20 offer any contrary evidence that Ms. Burke was engaged in an executive capacity. (*See*
21 *generally* PTI Resp.) Accordingly, the court "consider[s] the[se] fact[s] undisputed for
22 purposes of the motion." *See* Fed. R. Civ. P. 56(e)(2). In light of this evidence and in

1 light of PTI's burden on this issue, the court concludes that Ms. Burke is entitled to
2 partial summary judgment that the exemption for individuals employed in a bona fide
3 executive capacity found in RCW 49.46.130(2)(a) and RCW 49.46.130(3)(c) does not
4 apply to her claim.

5 *b. Administrative Capacity*

6 The Washington Administrative Code defines an "individual employed in a bona
7 fide . . . administrative . . . capacity," in part, as any employee "[w]hose primary duty
8 consists of the performance of office or non-manual field work directly related to
9 management policies or general business operations of his employer or his employer's
10 customers." WAC 296-128-520(1). Ms. Burke attests that she was "an over-the-road
11 shuttle driver" for PTI and that she "transport[ed] railroad crews between work sites."
12 (Burke Decl. ¶ 2.) She attests that her "job was to provide services to PTI's customers,
13 not to contribute to PTI's day-to-day business." (*Id.* ¶ 3.) PTI does not challenge this
14 testimony or offer any contrary evidence that Ms. Burke was engaged in an
15 administrative capacity. (*See generally* PTI Resp.) Accordingly, the court "consider[s]
16 the[se] fact[s] undisputed for purposes of the motion." *See* Fed. R. Civ. P. 56(e)(2). In
17 light of this evidence and in light of PTI's burden on this issue, the court concludes that
18 Ms. Burke is entitled to partial summary judgment that the exemption for individuals
19 employed in a bona fide administrative capacity found in RCW 49.46.130(2)(a) and
20 RCW 49.46.130(3)(c) does not apply to her claim.

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1 c. *Professional Capacity*

2 The Washington Administrative Code defines an “individual employed in a bona
3 fide . . . professional capacity,” in part, as any employee:

4 Whose primary duty consists of the performance of work . . . [r]equiring
5 knowledge of an advanced type in a field of science or learning customarily
6 acquired by a prolonged course of specialized intellectual instruction and
7 study, as distinguished from a general academic education and from an
8 apprenticeship, and from training in the performance of routine mental,
9 manual, or physical processes.

10 WAC 296-128-530(1)(a). Ms. Burke attests that her “position did not require any
11 specialized instruction or education.” (Burke Decl. ¶ 3.) PTI does not challenge this
12 testimony or offer any contrary evidence that Ms. Burke was engaged in a professional
13 capacity. (*See generally* PTI Resp.) Accordingly, the court “consider[s] the fact
14 undisputed for purposes of the motion.” *See* Fed. R. Civ. P. 56(e)(2). In light of this
15 evidence and in light of PTI’s burden on this issue, the court concludes that Ms. Burke is
16 entitled to partial summary judgment that the exemption for individuals employed in a
17 bona fide professional capacity found in RCW 49.46.130(2)(a) and RCW 49.46.130(3)(c)
18 does not apply to her claim.

19 4. Rate of Overtime Pay

20 Washington law provides:

21 Except as otherwise provided in this section, no employer shall employ any
22 of his or her employees for a workweek longer than forty hours unless such
employee receives compensation for his or her employment in excess of the
hours above specified at a rate not less than one and one-half times the regular
rate at which he or she is employed.

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1 RCW 49.46.130(1). Thus, unless an exemption or exception listed in RCW 49.46.130(2)
2 or elsewhere applies, Ms. Burke is entitled to one and one-half times her regular rate for
3 any overtime hours she worked while employed at PTI. The court has ruled that the
4 exemption found in RCW 49.46.130(2)(f) and the exemption for “[a]ny individual
5 employed in a bona fide executive, administrative, or professional capacity” found in
6 RCW 49.46.130(3)(c) and RCW 49.46.130(2)(a) do not apply to Ms. Burke’s claim. *See*
7 *supra* §§ III.B.2., 3. If PTI is unable to establish any other exemptions at trial or through
8 a dispositive motion, the court concludes on partial summary judgment that PTI was
9 required to pay Ms. Burke one and one-half times her regular rate of pay for hours she
10 worked in excess of 40 during any given work week while she was employed at PTI.

11 However, this ruling does not foreclose the possibility that PTI will establish some
12 other exemption or exception at trial or on a dispositive motion. The court also does not
13 conclude that PTI failed to properly pay Ms. Burke at the appropriate rate for all of the
14 overtime she worked. Indeed, Ms. Burke expressly stated that she intended to “submit, at
15 a later date, evidence of the amount of overtime PTI failed to pay her.” (MPSJ at 6.)
16 Thus, this issue was not before the court. With these caveats, the court GRANTS this
17 portion of Ms. Burke’s motion.

18 5. PTI’s Liability for Unpaid Overtime

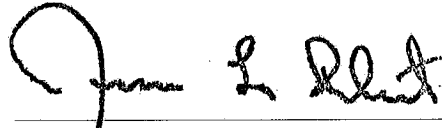
19 Ms. Burke also asks the court to rule that “PTI is liable for any overtime hours for
20 which Ms. Burke worked but was not properly compensated.” (MPSJ at 6.) As noted
21 above, although the court has granted Ms. Burke’s motion with respect to the specific
22 exemptions to overtime pay raised in her motion, there may be other exemptions or

1 exceptions that the parties have not raised and that PTI intends to establish either at trial
2 or in a dispositive motion. *See supra* § III.B.4. Indeed, PTI states that it intends to bring
3 its own motion for summary judgment prior to the dispositive motions deadline. (MET at
4 2.) In addition, there is no evidence before the court that Ms. Burke was not properly
5 compensated for the overtime she worked at PTI. (*See* MPSJ at 6 (stating that Ms. Burke
6 “will submit, at a later date, evidence of the amount of overtime PTI failed to pay her”).)
7 Accordingly, the court DENIES this portion of Ms. Burke’s motion.

8 IV. CONCLUSION

9 Based on the foregoing analysis, the court GRANTS in part and DENIES in part
10 Ms. Burke’s motion for partial summary judgment (Dkt. # 20), DENIES PTI’s motion for
11 an extension of time to respond (Dkt. # 23), and DENIES PTI’s request for Rule 56(d)
12 relief.

13 Dated this 21st day of November, 2018.

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15 JAMES L. ROBART
16 United States District Judge
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